NOT FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

HENRY JOSEPHAT (HARVEY), KAY WILLIAMS (HARVEY), SYLVIA BROWNE (CLIFTON HILL), ANGEL L. PARILLA (CLIFTON HILL) and other persons to numerous too mention, A CLASS ACTION, Plaintiffs, v. ST. CROIX ALUMINA, LLC., ALCOA, INC., and GLENCORE, LTD., f/k/a CLARENDON, LTD., Defendants.	)	CIV. NO. 1999-0036

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MEMORANDUM OPINION

Finch, Chief Judge

This matter comes before the Court on Plaintiffs' Amended Motion for Class Certification and Plaintiffs' Motion to Amend their Complaint. For the reasons expressed below, the Court will grant both motions.

I. Facts

The Representative Plaintiffs in this action, Josephat Henry,[1] Kay Williams, and Sylvia Browne are suing on behalf of themselves and others similarly situated (collectively "Plaintiffs"). Plaintiffs allege the following facts. Defendant St. Croix Alumina and Defendant Aluminum Company of America ("ALCOA") are the present owners and operators of the St. Croix Alumina plant. Defendant Glencore, Ltd., f/k/a Clarendon, Ltd ("Glencore") is a former owner and operator of the facility, and previously operated the Alumina Plant under the name of Virgin

[1] This Plaintiff is incorrectly listed in the complaint as Henry Josephat. His legal name is Josephat Henry.

Islands Alumina Company ("VIALCO").[2]

Plaintiffs claim that they and their property have been harmed by Defendants' failure to properly store and contain the red bauxite dust and red mud by-products of Defendants' St. Croix Alumina Plant. The red bauxite dust at issue comes from bauxite stored by Defendants in preparation for their production of alumina. "[T]he bauxite is put in a makeshift shelter that has no walls to protect the grain-like substance from the elements." Plts.' Amended Mot. for Class Cert. at 3. Red bauxite mud is produced during the refinement of the red bauxite dust, a process inherent to the eventual creation of alumina. Because of the origins of red bauxite mud, the mud contains significant amounts of bauxite, aluminum, silicon, iron, and sodium. This red bauxite mud is stored outside the facility in large piles.

Plaintiffs contend that Defendants are negligent by their "(1) storing bauxite in a make shift structure that is wholly inadequate to protect it from the elements, and (2) dumping the red dust residue and red mud in the areas surrounding their plant." Id. As a consequence of Defendants' negligence in storing the red bauxite dust and red mud, these hazardous products are regularly blown about the island of St. Croix, enveloping Plaintiffs' communities adjacent to and downwind from the St. Croix Alumina Plant.

The instant suit was brought after St. Croix was struck by Hurricane Georges on September 21, 1998. Plaintiffs claim that Defendant ALCOA and Defendant St. Croix Alumina failed to properly prepare for the hurricane by neglecting to secure its red mud and red bauxite dust. As a result of Defendants' negligence, the hazardous products were blown about St. Croix

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[2] Glencore contends that it never owned the alumina facility at issue in this case, and that it has never done business under the name of VIALCO. Rather, Glencore claims that it shipped bauxite to VIALCO. It did not oversee its production into alumina.

during the hurricane, covering Plaintiffs' homes, cisterns, yards and bodies. Additionally, Plaintiffs claim that Defendant ALCOA and Defendant St. Croix Alumina were negligent in both failing to promptly clean up the substances and in the eventual clean up process itself.

Accordingly, the proposed class of Plaintiffs "consists of all individuals who, as of September 21, 1998 [the date of Hurricane Georges], resided, worked, and/or owned property located in communities adjacent to and downwind from the St. Croix Alumina Refinery Plant, including, but not limited to, the projects of Harvey and Clifton Hill, as well as the estates of Barron Spot, Profit, Clifton Hill and La Reine, who have suffered damages and/or injuries as a result of Defendants' [conduct] with regard to the containment and storage of red dust containing bauxite and red mud." Plts.' Amended Mot. for Class Cert. at 7. Plaintiffs have separated this proposed class into the following four subclasses: medical monitoring, property damage, personal injury and punitive damages.[3]

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[3] The subclasses are defined as follows:

A. Subclass I [The Medical Monitoring Subclass]

This subclass consists of those individuals who resided and/or were employed in the communities adjacent to and downwind from the St. Croix Alumina Refinery Plant, including the projects of Harvey and Clifton Hill, as well as the estates of Barron Spot, Profit, Clifton [Hill] and La Reine, who have suffered and/or are threatened with suffering latent injuries, such as illness or disease, which are as yet unknown and undiscovered. Accordingly, this class consists of individuals who seek relief in the form of medical monitoring so that they may have periodic medical exams and tests to detect, prevent, and/or treat the afore described latent injuries.

B. Subclass II [The Property Damage Subclass]

This subclass consists of all individuals or entities who owned or held a leasehold interest in real property and improvements which was located in communities adjacent to and downwind from the St. Croix Alumina Refinery Plant, including the projects of Harvey and Clifton Hill, as well as the estates of Barron Spot, Profit, Clifton [Hill] and La Reine. These individuals or entities are those who have suffered economic harm and/or property damage, including: (1) the loss of use and/or enjoyment of their property; (2) the diminution of market or rental value; (3) the destruction, degradation and deterioration of the soil, vegetation, and improved property; and (4) the loss and/or damage of personal property, including but not limited to clothing furniture, draperies and other personal effects, which resulted from Defendants' alleged negligent acts and/or omissions with regard to the containment and storage of the red dust containing bauxite and/or red mud or with regard to the alleged negligent clean up of same.

C. Subclass III [The Personal Injury Subclass]

II. Analysis

A. Class Certification

A district court has discretion to grant or deny class certification. See Eisenberg v. Gagnon, 766 F.2d 770, 785 (3d Cir.), cert. denied, 474 U.S. 946 (1985). However, the "interests of justice require that in a doubtful case . . . any error, if there is to be one, should be committed in favor of allowing a class action." Id. at 785 (citations omitted). Further, it is not necessary for Plaintiffs to establish the merits of their case at the class certification stage. See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-178 (1974) (citation omitted) ("In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of [Fed. R. Civ. P. 23] are met."). With these standards in mind, the Court now turns to whether Plaintiffs have met the requirements for class certification.

To obtain class action certification, Plaintiffs bear the burden of proving that the proposed class action satisfies all four requisites of Fed. R. Civ. P. 23(a) and at least one part of Fed. R. Civ. P. 23(b). Baby Neal v. Casey, 43 F.3d 48, 55 (3d Cir. 1994). The four requirements of Rule

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> This subclass consists of those individuals who resided and/or were employed in the communities adjacent to and downwind from the St. Croix Alumina Refinery Plant, including the projects of Harvey and Clifton Hill, as well as the estates of Barron Spot, Profit, Clifton [Hill] and La Reine. These individuals are those who have suffered presently cognizable physical and emotional injuries as a result of Defendants' alleged negligent acts and/or omissions with regard to the containment and storage of red dust containing bauxite.
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> **D. Subclass IV [The Punitive Damages Subclass]**
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> This subclass consists of all members of the aforementioned three subclasses who have suffered harm as a result of Defendants' alleged grossly negligent acts and/or omissions with regard to the containment and storage of red dust containing bauxite and/or bauxite or the clean up related thereto.

Plts.' Amended Mot. for Class Cert. at 8-9.

23(a) are: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation.[4] The Rule 23(a) requirements "are meant to assure both that class action treatment is necessary and efficient and that it is fair to the absentees under the particular circumstances." Baby Neal, 43 F.3d at 55. Plaintiffs seek to certify their class pursuant to Rule 23(b)(3). A Rule 23(b)(3) class requires a finding that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods of fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3).

Additionally, Plaintiffs request that the Court certify Plaintiffs' claims of property damages, medical monitoring, personal injury, and punitive damages as separate but related subclasses pursuant to Rule 23(c)(4). Rule 23(c)(4) permits class treatment on limited issues through the use of subclasses. Specifically, Rule 23(c)(4) provides: "When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly." Fed. R. Civ. P. 23(c)(4). Thus, to obtain class certification, plaintiffs must prove numerosity, commonality, typicality, adequate representation, predominance and superiority with respect to the four subclasses sought to be

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[4] Specifically, Rule 23(a) provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable [numerosity], (2) there are questions of law or fact common to the class [commonality], (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class [typicality], and (4) the representative parties will fairly and adequately protect the interests of the class [adequacy].

Fed. R. Civ. P. 23(a).

certified. See In re Flat Glass Antitrust Litig., 191 F.R.D. 472 (W.D. PA. 1999). To the extent possible the Court shall combine the analysis of the class certification with the certification of the proposed subclasses.

1. Numerosity

Rule 23(a)(1) provides that class certification should not be granted unless the potential membership of the proposed class is "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Plaintiffs are not required to establish that joinder is impossible. Cannon v. Cherry Hill Toyota, Inc., 184 F.R.D. 540 (D.N.J. 1999). The Court "can make a common sense determination whether it would be difficult or inconvenient to join all class members as named parties under the particular circumstances of a case." Arch v. American Tobacco Co., 175 F.R.D. 469, 476 (E.D. Pa. 1997) (citations omitted).

The Third Circuit has held that joinder is impracticable even where the class is composed of less than one hundred members. Weiss v. York Hosp., 745 F.2d 786, 808 (3d Cir.1984). In Weiss, the court commented on the number of members necessary to satisfy the numerosity requirement. The court states:

> While the attitude taken towards a given number may vary, each opinion reflects a practical judgment on the particular facts of the case. Thus no hard and fast number rule can or should be stated, since "numerosity" is tied to "impracticability" of joinder under the specific circumstances. Nevertheless, some general tendencies can be observed. While there are exceptions, numbers under twenty-one have generally been held to be too few. Numbers between twenty-one and forty have evoked mixed responses and again, while there are exceptions, numbers in excess of forty, particularly those exceeding one hundred or one thousand have sustained the requirement.

Weiss, 745 F.2d at 808 (citing 3B J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 23.05[1], at 23-150 (2d ed. 1982) (footnotes omitted)).

In the instant case, Plaintiffs contend that the proposed class consists of several thousand St. Croix residents and that each of the proposed subclasses include several hundred persons. Plaintiffs' counsel submit that since 1998 they have been personally contacted by several hundred people. Plaintiffs offer the testimony of Mr. Henry, Ms. Williams and Ms. Browne. Mr. Henry testified that he personally knew of approximately 2000 people in his neighborhood who were affected by the red dust. Deposition of Henry at 145, ll. 8-11. Ms. Williams testified that she estimated 196 residences with 6 persons living in each unit were effected by red dust after Hurricane Georges. Deposition of Williams at 73, ll. 17-21. Ms. Browne testified that approximately 3000 people in her neighborhood were effected by the red dust after the hurricane. Deposition of Browne at 119, ll. 16-20.

Defendants argue that the class size is closer to 68 members. Defendants' basis for this assertion is that Plaintiffs have only submitted medical records of 68 purported class members. It is well established that the party seeking class certification need not state the exact number of members of the proposed class or identify each class member. See Robidoux v. Celani, 987 F.2d 931, 935 (2d Cir. 1993) (plaintiffs need only provide some evidence or reasonable estimate of class members); see also Liberty Lincoln Mercury, Inc. v. Ford Mktg. Corp., 149 F.R.D. 65, 73 (D.N.J. 1993) (moving party need not show exact size of proposed class). Given that the proposed class and subclasses have been defined to include the projects of Harvey and Clifton Hill and the estates of Barron Spot, Profit, Clifton Hill and La Reine, the Court finds it reasonable to conclude that there are potentially several thousand class members.

Some courts have held that an extremely large number of class members can alone establish that joining all of the class members would be impracticable. See Mathis v. Bess, 138

F.R.D. 390, 393 (S.D.N.Y. 1991) (joinder impracticable solely based on 120 class members); see also Moskowitz v. Lopp, 128 F.R.D. 624, 628 (E.D. Pa. 1989) (joinder impracticable because class numbered in thousands). Other courts hold that number in class is not, by itself, determinative. Liberty, 149 F.R.D. at 73; see also Ardrey v. Federal Kemper Ins. Co., 142 F.R.D. 105, 109 (E.D. Pa. 1992). Apart from class size, practicability of joinder also depends on "judicial economy, the geographic diversity of class members, the financial resources of class members, the relative ease or difficulty in identifying members of the class for joinder, and the ability of class members to institute individual lawsuits." Anderson v. Department of Public Welfare, 1 F. Supp. 2d. 456, 461 (E.D. Pa. 1998) (citations omitted). It is much more convenient and expedient for the Court to resolve the issue in this case in one adjudication as opposed to possibly hundreds or thousands of discrete and redundant actions. Further, because of their limited financial resources, class members in the instant case might be unlikely to institute individual actions. See Plts.' Reply Brief at 16. Thus, the Court finds that joinder would be impracticable.

2. Commonality

Rule 23(a)(2) requires that there be questions of law and/or fact which are common to the class as a whole.[5] Fed. R. Civ. P. 23(a)(2). The "threshold of commonality is not high" and not all questions of law or fact raised need be common. In re School Asbestos Litig., 789 F.2d 996, 1010 (3d Cir.), cert. denied, 479 U.S. 915 (1986); see also Hurt v. Philadelphia Hous. Auth., 151

[5] The typicality and commonality analyses required by Rule 23(a)(2) and (a)(3) tend to merge into a single inquiry. See General Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 158 n. 13 (1982); but see Georgine v. Amchem Prods., Inc., 83 F.3d 610, 626 (3d Cir. 1996), aff'd, 521 U.S. 591 (1997) ([D]espite their similarity, commonality and typicality are distinct requirements under Rule 23. . . . Commonality like numerosity evaluates the sufficiency of the class itself, and typicality like adequacy of representation evaluates the sufficiency of the named plaintiff.") (citations omitted).

F.R.D. 555 (E.D. Pa. 1993). The commonality requirement is "satisfied if the named plaintiffs share at least one question of law or fact with the grievances of the prospective class." Baby Neal v. Casey, 43 F.3d 48, 56 (3d Cir. 1994). In this case, Plaintiffs assert that the following questions of law or fact are common to the Plaintiff class and subclasses:

1. whether . . . Defendants' method of handling the red dust containing bauxite was appropriate in light of the existing and foreseeable circumstances;
2. whether . . . Defendants were negligent in failing to prevent . . . Plaintiffs from coming into contact with air, water, and soil contaminated with bauxite;
3. whether . . . Defendants were negligent in failing to adequately warn . . . Plaintiffs and the St. Croix community of the potential for contamination;
4. whether . . . Defendants are strictly liable for their negligence in failing to sufficiently store and contain substances hazardous to human health;
5. whether . . . Defendants' failure to sufficiently store and contain the red bauxite dust constitutes a private and public nuisance;
6. whether . . . Defendants [sic] acts and/or omissions constitute negligence per se based on their violations of federal, state, and municipal law; and
7. whether . . . Defendants are grossly negligent in that their acts and/or omissions constitute reckless and conscious indifference to the rights and welfare of . . . Plaintiffs.

Plts.' Reply Brief at 6-7.

In addition to the above questions of law and fact common to each class member, Plaintiffs submit the following common questions with respect to the specific subclasses:

1. The medical monitoring subclass share the common question of law or fact of whether, as a result of . . . Defendants' negligence in securing and containing the red bauxite dust, they have been exposed to hazardous substance[s], have an increased risk of contracting a serious latent disease, and are thus in need of periodic medical testing.
2. The property damage subclass share the common question of law or fact of whether, as a result of . . . Defendants' negligence in securing and containing the red [bauxite dust], they have incurred damage to their property as a result of the red [bauxite dust] permeating every facet of their property and structures.
3. The personal injury subclass share the common question of law or fact of whether, as a result of . . . Defendants' negligence in securing and containing the red [bauxite dust], they have developed personal injuries manifesting themselves as skin rashes, dermatitis, and respiratory afflictions.

Plts.' Reply Brief at 6.

Thus, there are at least seven issues of law or fact common to all of the class members and at least one issue of law or fact common to each of the subclasses. Further, the resolution of these questions could affect the entire putative class. Accordingly, the Court finds that Plaintiffs have met the commonality requirement.

3. Typicality

"Typicality entails an inquiry into whether the named plaintiff's individual circumstances are markedly different or the legal theory upon which the claims are based differs from that upon which the claims of other class members will perforce be based. " Reilly v. Gould, Inc. 965 F. Supp. 588, 598 (M.D. Pa. 1997) (quoting Hassine v. Jeffes, 846 F.2d 169, 177 (3d Cir.1988)). "The typicality requirement is intended to preclude certification of those cases where the legal theories conflict with those of the absentees," Reilly 965 F.Supp. 598 (quoting Georgine, 83 F.3d at 631), and "to assure that the absentees' interests will be fairly represented." Reilly, 965 F.Supp. 598 (quoting Baby Neal, 43 F.3d at 57). Slight factual differences between the damages and/or injuries incurred by various class members will not render their claims atypical if their claims arise from the same event or practice or course of conduct and are based on the same or similar legal theory. Baby Neal, 43 F.3d at 58 ("[E]ven relatively pronounced factual differences will generally not preclude a finding of typicality where there is a strong similarity of legal theories."). In other words, the typicality inquiry focuses on Defendants' behavior not on Plaintiffs'. Deutschman v. Beneficial Corp., 132 F.R.D. 359, 373 (D. Del. 1990). If Defendants' course of conduct gives rise to all of the class members' claims, and if Defendants have not taken

any action unique to the named Plaintiff, then the representative's claim is typical. Id. (citations omitted).

In the instant case, all of Plaintiffs' claims arise from Defendants' alleged failure to properly secure and contain red bauxite dust. As such, the factual and legal theories upon which the named Plaintiffs are basing their claims are substantially the same as the absentee class members. Accordingly, the Court finds that Plaintiffs have met the typicality requirement of Rule 23(a)(3).

4. Adequate Representation

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The adequacy of representation inquiry involves a two pronged test which is "designed to ensure that absentees' interests are fully pursued. First, the interests of the named plaintiffs must be sufficiently aligned with those of the absentees. . . . Second, class counsel must be qualified and must serve the interests of the entire class." Georgine, 83 F.3d at 630 (internal citations omitted); see also In re Flat Glass Antitrust Litig., 191 F.R.D. 472, 482-483 (W.D. Pa. 1999) ("Adequacy of representation means that the class representative has common interests with unnamed class members and will vigorously prosecute the interests of the class through qualified counsel.") (citations omitted).

Turning to the first part of the inquiry, the Court looks to whether the class representative is part of the class and possesses the same interest and suffers the same injury as the class members. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625-626 (1997) (quoting East Tex. Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395, 403 (1977)). The interests of the class representative and the absentee class members need not be identical. See Kamen v. Kemper Fin.

Servs. Inc., 908 F.2d 1338, 1349-1350 (7th Cir. 1990), rev'd on other grounds, 500 U.S. 90 (1991). Rather, the interests of the class representative must not be antagonistic to those of the class members. See Cannon v. Cherry Hill Toyota, 184 F.R.D. 540, 545 (D.N.J. 1999). Finally, the Court must determine that the "putative named plaintiff has the ability and the incentive to represent the claims of the class vigorously . . . ." Reilly v. Gould, Inc. 965 F. Supp. 588, 600 (M.D. Pa. 1997) (quoting Hassine v. Jeffes, 846 F.2d 169, 179 (3d Cir. 1988)).

In the instant case, Defendants argue that the named representative Plaintiffs are inadequate representatives for the same reasons that Plaintiffs fail to satisfy Rule 23(a)'s requirements of commonality and typicality. As the Court found with the typicality and commonality analyses, the named Plaintiffs' individual circumstances are not so markedly different from those of the class members so as to render Plaintiff representatives inadequate to represent the absentee class members.[6]

Additionally, Defendants argue that the named class representatives are inadequate because each representative has claims that are subject to a variety of unique defenses, including both credibility challenges and causation defenses.[7] Specifically, Defendants aver, *inter alia*, that (1) Mr. Henry has failed to admit to his previous history of asbestos litigation; (2) Ms. Browne testified that the property allegedly damaged by the red bauxite dust was also damaged by black

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[6] "The adequacy-of-representation requirement 'tend[s] to merge' with the commonality and typicality criteria of Rule 23(a), which 'serve as guideposts for determining whether . . . maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.'" Amchem, 521 U.S. at 626, n.20 (quoting General Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 157, n. 13 (1982)). Therefore, a finding that a class member is an adequate representative will also depend upon whether the Court finds that the other factors of Rule 23 have been met.

[7] Because the Court addresses Defendants' causation argument in the predominance analyses, the Court will not address that argument again here.

soot and oil from the refineries close to her home; and (3) Ms. Williams claims that the bauxite caused her itchy skin and burning eyes, but her medical records reveal that she has been treated in the past for a food allergy that caused these same symptoms.[8] See Defs. St. Croix Alumina and ALCOA's Opp. to Class Certification at 23-24.

In determining whether a unique defense means that the named Plaintiff is not an adequate representative, the Court looks to whether the defense will be a "major focus" of the litigation. Koos v. First Nat'l Bank, 496 F.2d 1162, 1164 (7th Cir.1974). Thus, "if the credibility or honesty of the class representatives threatens to become a focus of the litigation, the class representatives will be inadequate representatives. Conversely, if the credibility of the class representatives is not subject to serious question or does not threaten to become the central issue in the litigation, then a credibility problem will not create a unique defense defeating certification." 5 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE ¶ 23.25[4][e] (3d ed. 2000) (footnotes omitted).

At this time, the Court finds that the credibility of the class representatives is not the central issue in the instant litigation. The Court also finds that the named class representatives have suffered the same or similar injuries and possess the same interest as the class members they represent. See General Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 156 (1982) (quotations omitted). Further, there are no conflicts or antagonisms between the claims asserted by the named Plaintiffs and the claims which are to be asserted on behalf of the class members. See Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239, 247 (3d Cir.), cert. denied 421 U.S. 1011,

[8] Plaintiffs offer Mr. Henry as the representative of the personal injury subclass, Ms. Browne as the representative of the property damage subclass, and Ms. Williams as the representative of the medical monitoring subclass.

(1975). Finally, the Court finds that based upon the testimony of Mr. Henry, Ms. Browne and Ms. Williams, these representatives have the ability and incentive to represent the claims of the class vigorously.[9] See Hassine v. Jeffes, 846 F.2d 169, 179 (3d Cir. 1988). Thus, Plaintiffs have satisfied the first prong of the adequacy of representation inquiry.

In determining whether Plaintiffs have met the second prong of the adequacy of representation inquiry, the Court looks to whether Plaintiffs' attorney is qualified, experienced, and generally able to conduct the proposed litigation. Weiss v. York Hosp., 745 F.2d 786 (3d Cir. 1984). In the instant action, the Court finds that Plaintiffs are represented by attorneys who meet this requirement. Attorney Lee J. Rohn is an experienced and respected attorney in this Court's jurisdiction who has successfully prosecuted several civil actions including a bauxite contamination action before this Court. Further, co-counsel, Attorney Scott Summy is extensively experienced in the litigation of complex toxic tort litigation and, according to Plaintiffs, "has been involved in the prosecution of a number of environmental contamination actions across the United States." Plts.' Amended Mot. for Class Cert. at 17.

Moreover, Defendants do not dispute the experience of Plaintiffs' attorneys. Rather,

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[9] Specifically, Mr. Henry, Ms. Browne and Ms. Williams all testified that:

1. They understand that they are representative of a class composed of several persons;
2. They agree with all of the claims brought against the Defendants;
3. They understand their responsibilities as a class representative;
4. They are satisfied with the advice of the Class members' attorneys;
5. They understand the financial obligations which will be incurred in order to vigorously prosecute the Plaintiff class members' claims and are confident that those obligations will be met;
6. They take their obligations as a representative of many class members seriously; and
7. They are mindful that decisions made in the prosecution of the Plaintiff class members' claims are subject to the Court's approval.

Plts.' Reply Brief at 9 (citing the Depositions of Henry, Browne and Williams) (footnotes omitted).

Defendants argue that Plaintiffs' counsel is not qualified to represent the best interest of the potential class members because (1) Plaintiffs' counsel has been unable to comply with the scheduling order issued by this Court on July 15, 1999, and (2) Plaintiffs' counsel has not submitted all of the medical records for named Plaintiffs despite repeated requests. The Court is not persuaded that Plaintiffs' counsel is inadequate based solely on the foregoing claims by Defendants.

5. Predominance and Superiority Requirements

Having found that the four prerequisites of Rule 23(a) have been satisfied, the Court now turns to the question of whether the putative class and subclasses fall within any one of the three categories of Rule 23(b). Plaintiffs contend that their proposed class and subclasses meet the criteria of Rule 23(b)(3). Rule 23(b)(3) provides that a class action may be maintained if the Court finds that "questions of law or fact common to the members of the class predominate over any questions affecting only individual class members,[10] and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). This section of the Rule further provides:

> The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed. R. Civ. P. 23(b)(3).

a. Predominance

[10] The Rule 23(b)(3) predominance inquiry incorporates the Rule 23(a) commonality requirement. See Georgine 83 F.3d at 626.

Defendants contend that class certification is inappropriate in mass toxic tort actions. See, e.g., In re Masonite Corp. Hardboard Siding Prods. Liab. Litig., 170 F.R.D. 417, 419 (E.D. La. 1997) ("Class certification [of mass tort cases] exists today in an environment of diminished respect."). Defendants also point to the advisory committee notes to Rule 23(b)(3) which provide:

> A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.

Georgine, 83 F.3d at 627 (quoting Fed. R. Civ. P. 23(b)(3) Advisory Notes to 1966 Amendment).

Plaintiffs argue and the Court agrees that Rule 23(b)(3) does not categorically exclude mass tort cases from class certification. In Amchem Products, Inc. v. Windsor, 521 U.S. 591, 625 (1997), the Supreme Court states that "[e]ven mass tort cases arising from a common cause or disaster may, depending upon the circumstances, satisfy the predominance requirements [of Rule 23(b)(3)]." Furthermore, "[i]n mass tort actions, the requirement of common questions has been satisfied by a showing of commonality either as to liability . . . or as to the cause or impact of the tortious action." Reilly v. Gould, Inc. 965 F. Supp. 588, 597 (M.D. Pa. 1997) (quoting In re Asbestos Sch. Litig., 104 F.R.D. 422, 429 (E.D. Pa. 1984)); see also Sterling v. Velsicol Chemical Corp., 855 F.2d 1188, 1197 (6th Cir. 1988) ("where the defendant's liability can be determined on a class-wide basis because the cause of the disaster is a single course of conduct which is identical for each of the plaintiffs, a class action may be the best suited vehicle to resolve such a controversy").

Next, Defendants argue that in cases alleging exposure to possibly hazardous materials, the Third Circuit has held that certification is precluded by the predominance of individual questions as to: the amount and duration of individual exposure, extent of actual injury manifested by any particular plaintiff, and diverse individual medical history that will be material to any causation analysis. Georgine v. Amchem Prods., Inc., 83 F.3d 610 (3d Cir. 1996), aff'd Amchem Prods., Inc. v. Windsor 521 U.S. 591, 625 (1997).

Plaintiffs maintain and the Court agrees that Georgine differs from the instant action. In Georgine, the Third Circuit decertified a complicated settlement class action where the class members were exposed to different asbestos-containing products for different amounts of time, in different ways, and over different periods of time. Georgine, 83 F.3d at 626. Additionally, the Georgine court was faced with a plaintiff class which included a general class that mixed together those presently injured with those who were only exposed without the benefit of subclasses to align their differing interests. Id. Further, in Georgine the proposed class could potentially number over one million. Id. at 627. Moreover, the factual and legal differences in Georgine were magnified by the fact that an individualized choice of law analysis applied to each plaintiff's claim. Id.

In sum, the Court finds that at this time Defendants' liability is the predominate issue in the instant action. Specifically, the issue of whether Defendants failed to secure red bauxite dust and whether that failure resulted in a hazardous substance permeating Plaintiff class' neighborhoods predominates over individual issues. Accordingly, Plaintiffs have met the predominancy requisite.

b. Superiority

As stated above, Rule 23(b)(3) requires that the Court find that a class action is superior to other available litigation methods for the fair and efficient adjudication of the controversy. Fed. R. Civ. P. 23(b)(3). In the instant case, the Court agrees with Plaintiffs that a class action is the most efficient and fair means of adjudicating their claims. First, a class action would permit Plaintiffs to be compensated for their damages and/or injuries regardless of their individual financial ability to bring suit on their own. Secondly, a class action would save the Court's time by eliminating the need to present redundant evidence on behalf of each and every Plaintiff. Thirdly, a class action is the superior litigation device in that there would be minimal difficulties in managing the class. Accordingly, the superiority requirement is met.

6. Certification of Subclasses Pursuant to Rule 23(c)(4)

a. Property Damage Subclass

Defendants rely on Boring v. Medusa Portland Cement Co., 63 F.R.D. 78 (M.D. Pa. 1974) to argue that class certification of the property damage subclass is inappropriate. In Boring, the plaintiffs sought to certify a class of individuals exposed to finely ground limestone dust released into the air from two nearby sources. The court found that such a case was not appropriate for class litigation, because of the uncommon questions of fact between the potential class members such as direction of wind and location of the factories. Boring, 63 F.R.D. at 84. In Boring, the court states that

> [t]he proposed class not only consists of wholly distinct degrees of damage, but wholly different types of damage. The only common fact is the allegation that their damages are caused by the same sources. The nature of the differing injuries runs the gamut from damage to fee simple and leasehold interests in real estate to damaged personalty, unpleasant surroundings and an unsightly environment.

Boring, 63 F.R.D. at 84.

Defendants argue that the instant case is similar to Boring in that the proximate cause issues inherent to the property damage subclass require analysis of the fact that any exposure to bauxite would vary greatly from property to property depending upon various factors including climate (wind, temperature, storm events, etc.) and geography; the properties' distance from St. Croix Alumina; damage inflicted on the properties by water and wind; and factors relating to the properties' exposure to alternative sources of causation such as the Hess Refinery and the Anguilla Dump. St. Croix Alumina's Opposition at 16. Other issues which Defendants argue will vary greatly include the differing value of the injured real estate and the value of any structures or improvements on the property; loss of enjoyment/use of property which will vary depending upon the location of the property; improvements on the property; and how the owners actually used or enjoyed the property in question. Id. Finally, Defendants contend that questions as to whether individual property owners have any damage claims after Defendants' remediation efforts are also individual. Id.

The Court finds that Boring is factually distinct from the instant case. Specifically, Boring involved a proposed Plaintiff class that was so broadly defined to include past and present residents, transitory persons, vehicles temporarily in the area and even visitors. Moreover, the air pollution involved in Boring was "from two sources [i.e., two distinct defendants] releasing similar compounds in such a fashion as to raise considerable evidentiary problems." Boring, 63 F.R.D. at 84. In sum, Boring differs from the instant action in two ways. First, the proposed class definition in Boring was confusing in that it included such a broadly defined group of potential plaintiffs. Second, Boring involved problems with attributing the ratio of liability

between the named defendants.

In the instant case, there is no such confusion. The proposed property damage subclass is clearly defined to consist of Plaintiffs who have incurred substantial damage to property they own or lease including: (1) the loss of use and/or enjoyment of their property; (2) the diminution of market or rental value; (3) the destruction, degradation, and deterioration of the soil vegetation and improved property; and (4) the loss and/or damage of personal property. Moreover, there is only one alleged source of the red bauxite dust, namely the St. Croix Alumina Plant.

Finally, the Third Circuit has held that property damage claims are appropriate for class certification because they tend to exhibit fewer individualistic characteristics. See In re School Asbestos Litig., 789 F.2d 996, 1009 (3d Cir. 1986), cert. denied, 479 U.S. 915 (1986) (The court upheld certification of a nationwide class action for damages associated with asbestos removal explicitly on the grounds that the case involved property damage.).

b. Medical Monitoring Subclass

In re Paoli Railroad Yard PCB Litigation., 916 F.2d 829 (3d Cir. 1990) (Paoli I) sets forth four factors a plaintiff must prove in order to recover for a medical monitoring claim:

> 1. Plaintiff was significantly exposed to a proven hazardous substance through the negligent actions of the defendant.
> 2. As a proximate result of exposure, plaintiff suffers a significantly increased risk of contracting a serious latent disease.
> 3. That increased risk makes periodic diagnostic medical examinations reasonably necessary.
> 4. Monitoring and testing procedures exist which make the early detection and treatment of the disease possible and beneficial.

Id. at 852. Further, these factors must be proven by competent expert testimony. Id. The Third Circuit later refined this test to add an element of proof requiring a plaintiff to show that "a

reasonable physician would prescribe for him or her a monitoring regime different than the one that would have been prescribed in the absence of that particular exposure." In Re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 788 (3d Cir. 1994) (Paoli II) ("[U]nder this cause of action, a plaintiff may recover only if the defendant's wrongful acts increased the plaintiff's incremental risk of incurring the harm produced by the toxic substance enough to warrant a change in the medical monitoring that otherwise would be prescribed for that plaintiff."). Defendants assert that the addition of this element led the court in Arch v. American Tobacco, 175 F.R.D. 469 (E.D. Pa. 1997), aff'd 161 F.3d 127 (3d Cir. 1998) sub nom Barnes v. American Tobacco Co.,, cert. denied 119 S. Ct. 1760 (1999) to conclude that a monitoring class was not suitable for certification.

At this time, the Court is satisfied that the individual issues in this case will not interfere with the proof required by the above medical monitoring elements. Specifically, the Court finds that the individual issues will not interfere with Plaintiffs' ability to show, *inter alia*, (1) that bauxite is a hazardous substance and that Plaintiffs' exposure to this hazardous substance was the direct and proximate result of Defendants' negligence; (2) that as a result of Defendants' negligent acts and/or omissions, Plaintiffs are at a significant risk for contracting a latent disease or other injury; (3) that because of the significant amount of exposure to the bauxite, Plaintiffs have an increased risk of developing serious health conditions in the future; and (4) medical testing for potential health conditions resulting from the exposure to the bauxite is readily available at an ascertainable cost. Additionally, the Court, at this time, finds no reason to conclude that certification of the instant class will preclude Plaintiffs from showing that a reasonable physician would prescribe for each class member a monitoring regime different than the one that would have been prescribed in the absence of exposure to the alleged hazardous substance.

Furthermore, the tobacco cases cited by Defendants differ from the instant action in that those cases involved complicated issues of tobacco addiction. In Barnes, the Third Circuit upheld the district court's decision regarding the medical monitoring claim "because nicotine addiction must be determined on an individual basis" and was an essential part of the Barnes' plaintiffs' medical monitoring claim. Barnes, 161 F.3d 146. In fact, the Barnes court notes that "individual issues raised by cigarette litigation often preclude class certification," and significantly no federal appeals court has upheld the certification of a class of cigarette smokers or reversed a district court's refusal to certify such a class. Barnes, 161 F.3d 143, n. 19; see, e.g., Castano v. The American Tobacco Co. 84 F.3d 734 (5th Cir. 1996); see also Ruiz v. The American Tobacco Co., 180 F.R.D. 194 (D. Puerto Rico 1998).

For the foregoing reasons, the Court will certify Plaintiffs' medical monitoring subclass.

c. Personal Injury Subclass

Plaintiffs argue that the personal injuries suffered by Plaintiffs are common to the subclass in that such injuries are presently manifesting themselves in the form of respiratory illnesses, severe skin rashes, and other conditions which have all been diagnosed to be the result of their exposure to the red bauxite dust. Plaintiffs admit that there may be some slight variances in the manner in which Plaintiffs' injuries are manifesting themselves, but contend that their injuries are similar in nature and appear to be progressing at a common rate of seriousness. Thus, Plaintiffs aver that their personal injury claims are sufficiently common among the class members to be certified as a subclass.

Defendants dispute Plaintiffs' claim that the class members allege similar types and degrees of personal injuries. Specifically, Mr. Henry complains of respiratory problems that he claims

require him to use at-home oxygen. St. Croix Alumina's Opposition at 9 (citing Pltfs.' document SB0502, Exhibit 10). Ms. Browne alleges thyroid cysts and stones, high blood pressure, itching skin, and other ailments. Id. at 10. Ms. Williams claims that she lost her menstrual cycle as a result of the red dust. Id. at 11. Defendants contend that the medical records produced by Plaintiffs for 65 other putative plaintiffs likewise identify diverse maladies.

Further, Defendants argue that the individual health histories and various health factors (i.e., smoking, asbestosis, etc.) of the individual class members will effect the personal injury claims. Defendants contend that discovery has confirmed these differences. For example, Mr. Henry complains of wheezing and coughing which he attributes to his exposure to red dust. Id. at 23. His medical history, however, reveals that he suffers from asbestosis, which caused the identical symptoms about which he now complains. Id. Likewise, Ms. Williams' medical records reveal that she has been treated in the past for a food allergy which caused the same symptoms she now claims were caused by red dust. Id. at 24.

The Court recognizes the existence of individual issues, such as the medical histories of each potential class member. However, the Court does not currently find the individual issues to predominate over the common issues such as Defendants' liability. And, of course, the Court may and is obligated to decertify this subclass or any of the subclasses if it finds, upon further discovery or at trial, that the class or subclasses are unmanageable. See In re School Asbestos Litig., 789 F.2d 996 (3d Cir.), cert. denied, 479 U.S. 915 (1986) ("[C]ertification is conditional. When, and if, the district court is convinced that the litigation cannot be managed, decertification is proper."); see also German v. Federal Home Loan Mortgage Corp., 885 F.Supp. 537, 554 (S.D.N.Y. 1995) ("Further proceedings may reveal that some of the questions raised by the

plaintiffs require individual inquiries, inappropriate for a class action, which can be resolved either by further defining the scope of the class action, by designating further sub-classes or by decertifying the class if that were to become necessary.").

d. Punitive Damages Subclass

For the same reasons certification of the above three subclasses is appropriate, the Court finds certification of the punitive damages subclass appropriate.

B. Motion to Amend Complaint

Plaintiffs move to amend their complaint to add additional Plaintiffs to be representatives of the class.[11] Defendants argue that Plaintiffs' Motion to Amend should be denied because (1) the putative named Plaintiffs add nothing to the representative capacity of the named Plaintiffs, and (2) Plaintiffs have missed their deadline to add new class representatives.[12]

Fed. R. Civ. P. 15(a) provides the standard for amending a complaint: "[A] party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). Such permission to amend rests with the discretion of the Court, "but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion." Foman v. Davis, 371 U.S. 178, 182 (1962); see also Heyl & Patterson Int'l, Inc. v. F.D. Rich Housing, 663 F.2d 419, 425 (3d Cir. 1981). Additionally, the Court's discretion under Rule 15 "must be tempered by

[11] The proposed amended Plaintiffs are Maude Drew, Antonia Cruz, Martha Acosta, Rosemond Harper, Jose Berrios (as an individual and as father and next of friend of Miguel Sanes, a minor), and Wilhelmina Glasgow.

[12] Plaintiffs' motion comes approximately two months after the original deadline for filing the Motion for Class Certification and six weeks after the actual filing itself.

considerations of prejudice to the non-moving party, for undue prejudice is 'the touchstone for the denial of leave to amend.'" Heyl, 663 F.2d at 425 (quoting Cornell and Co., Inc. v. Occupational Safety and Health Review Comm'n, 573 F.2d 820, 823 (3d Cir. 1978)); accord Foman, 371 U.S. at 182. "In the absence of substantial or undue prejudice, denial must be grounded in bad faith or dilatory motives, truly undue or unexplained delay, repeated failure to cure deficiency by amendments previously allowed or futility of amendment." Heyl, 663 F.2d at 425 (citing Foman, 371 U.S. at 182).

In the instant case, Defendants argue that Plaintiffs' motion is untimely. However, Defendants do not specifically allege that they have been prejudiced by Plaintiffs' untimely filing. Rather, Defendants aver that the addition of seven new named Plaintiffs at this stage of the lawsuit would frustrate the discovery process. The Third Circuit has held that mere delay is not by itself enough to justify denial of leave to amend. Kiser v. General Elec. Corp., 831 F.2d 423, 427 (3d Cir. 1987); see also Howze v. Jones & Laughlin Steel Corp., 750 F.2d 1208, 1212 (3d Cir. 1984) (citing Cornell and Co., Inc. v. Occupational Safety and Health Review Comm'n, 573 F.2d 820 (3d Cir. 1978). For the delay to become a legal ground for denying the motion, it must result in prejudice to the party opposing the amendment. Kiser, 831 F.2d at 427-428. Further, it is the opposing party's burden to prove that such prejudice will occur. Id.; see also Playboy Enter., Inc. v. Universal Tel-A-Talk, Inc., No. Civ. A. 96-6961, 1998 WL 288423, at *2 (E.D. Pa. June 3, 1998) (citing Dole v. Arco Chem. Co., 921 F.2d 484, 487 (3d Cir. 1991)) ("To show prejudice, defendants must demonstrate that their ability to present their case would be seriously impaired if amendment were allowed.").

In the instant case, Defendants have failed to show that their case would be severely

impaired should the Court grant Plaintiffs leave to amend their complaint. Further, because discovery in the instant action is ongoing, Defendants will not be unduly burdened should they choose to serve the newly named Plaintiffs with discovery.

Next, Defendants argue that the addition of seven new named Plaintiffs will add nothing to the class qualifications of the representative Plaintiffs. Thus, the addition of the putative Plaintiffs would be repetitious and unnecessary.[13] Plaintiffs argue that the amendment is intended to more efficiently represent the proposed class which Plaintiffs are attempting to have certified. Further, Plaintiffs aver that the putative Plaintiffs will be more representative of the proposed class. Thus, Plaintiffs contend that the addition of the putative Plaintiffs is necessary.

Finally, Defendants argue that Plaintiffs' Motion to Amend should be denied because Plaintiffs have acted with a dilatory motive. "Dilatory" is defined as "[t]ending or intended to cause delay or to gain time or to put off a decision." BLACK'S LAW DICTIONARY 457 (6th ed. 1990). According to Defendants, Plaintiffs' Motion to Amend is "a blatant attempt . . . to stall for time and/or to embark on a perpetual quest to recruit qualified named plaintiffs to represent the proposed classes/subclasses." Defs.' Opp. to Motion to Amend Complaint at 7. Further, Defendants contend that Plaintiffs' delay in submitting the names of the putative named Plaintiffs is evidence of their dilatory motive. The Court disagrees. That Plaintiffs delayed in submitting their proposed amendment does not support the conclusion that they acted in bad faith or with a dilatory motive.

III. Conclusion

[13] Plaintiffs agree with Defendants that the proposed Second Amended Complaint is repetitious of the original Complaint. Specifically, Plaintiffs state that the amended complaint does not add any new causes of action nor present any new facts; it simply seeks to add named Plaintiffs.

A. Class Certification

Because the Court finds that Plaintiffs have met the prerequisites of Rule 23, the Court will certify Plaintiffs' class and subclasses. However, the Court may modify or decertify either the class or any one of the subclasses, if, at a later date, it appears appropriate to do so.

B. Motion to Amend Complaint

The Court, in its discretion, will allow Plaintiffs to amend their Complaint. Defendants have failed to show that such an amendment would impose substantial or undue prejudice. Further, Plaintiffs have not acted in bad faith or with unexplained delay. Finally, such an amendment would not be futile.[14]

ENTER:

DATED: August ____, 2000

_____
RAYMOND L. FINCH
U.S. DISTRICT JUDGE

A T T E S T:
Orinn F. Arnold
Clerk of Court
by: _____
Deputy Clerk

[14] "'Futility' means that the complaint as amended would fail to state a claim upon which relief can be granted. In assessing 'futility,' the district court applies the same standard of legal sufficiency as applie[d] under Rule 12(b)(6)." In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1434 (3d Cir. 1997). In the instant case, Plaintiffs are not seeking to add new causes of action or present any new facts. Because the addition of the seven representative Plaintiffs will not change the legal sufficiency of the Complaint under Rule 12(b)(6), the amendment would not be futile.

NOT FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

HENRY JOSEPHAT (HARVEY), KAY WILLIAMS (HARVEY), SYLVIA BROWNE (CLIFTON HILL), ANGEL L. PARILLA (CLIFTON HILL) and other persons to numerous too mention, A CLASS ACTION, Plaintiffs, v. ST. CROIX ALUMINA, LLC., ALCOA, INC., and GLENCORE, LTD., f/k/a CLARENDON, LTD., Defendants.	)	CIV. NO. 1999-0036

ORDER

This matter comes before the Court on Plaintiffs' Amended Motion for Class Certification and Plaintiffs' Motion to Amend their Complaint. For the reasons expressed in the attached Memorandum Opinion, it is hereby

ORDERED that Plaintiffs' Amended Motion for Class Certification and Plaintiffs' Motion to Amend their Complaint are **GRANTED**.

ENTER:

DATED: August ____, 2000

_____
RAYMOND L. FINCH
U.S. DISTRICT JUDGE

A T T E S T:
Orinn F. Arnold
Clerk of Court
by: _____
Deputy Clerk

cc: Glenda Cameron, Esq.

Bernard Pattie, Esq.
Derek Hodge, Esq.